

Exhibit 67

STATE OF TEXAS, ET AL. vs UNITED STATES OF AMERICA, ET AL.
Stephen Legomsky on 08/01/2018

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS, ET AL.,)
Plaintiffs,)
vs.) Case No. 1:18-cv-00068
UNITED STATES OF AMERICA, ET)
AL.,)
Defendants,)
and)
KARLA PEREZ, ET AL.,)
STATE OF NEW JERSEY,)
Defendant-Intervenors.)

THE DEPOSITION OF STEPHEN LEGOMSKY

Taken on behalf of Plaintiffs

August 1, 2018

HUSEBY GLOBAL LITIGATION
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1 Exhibit 1197
2 Article

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4 The original exhibits were retained by the court reporter
5 to be attached to COUNSEL'S transcripts.

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THE DEPOSITION OF STEPHEN LEGOMSKY, produced,
sworn, and examined on behalf of the Plaintiffs, August
1, 2018, between the hours of eight o'clock in the
forenoon and five o'clock in the afternoon on that day,
at the offices of Alaris Litigation Services, 711 N.
11th Street, St. Louis, Missouri 63101, before Rebecca
L. Tuggle, a Registered Professional Reporter,
Certified Court Reporter, and Certified Shorthand
Reporter within and for the State of Missouri.

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1 the part of the Plaintiffs, and after responding "Yes"
2 to the oath administered by the court reporter, deposes
3 and says:

4 EXAMINATION

5 QUESTIONS BY MR. DISHER:

6 Q Mr. Legomsky, good afternoon.

7 A Good afternoon.

8 Q Can you please introduce yourself to the
9 court?

10 A Sure. I apologize in advance, I'm losing a
11 little bit of my voice; so tell me if I need to pipe
12 up. My name is Stephen Legomsky. S-t-e-p-h-e-n
13 L-e-g-o-m, as in Mary, s-k-y.

14 Q Thank you, Mr. Legomsky. Mr. Legomsky, you
15 are a law professor so I'll spare you some of the
16 formalities about introducing the deposition process,
17 but two things to point out. If you ever don't
18 understand any of my questions, please let me know.
19 Is that fair?

20 A Yes. Thank you.

21 Q And then if you ever need to take a break
22 today, also just let me know and we'll take a break.
23 But if there is a question pending on the table, I'd
24 ask that you would answer that question before we take
25 a break. Is that fair?

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1 A Yes.

2 Q All right. Mr. Legomsky, you have been
3 vocal about your views about the legality of DAPA and
4 DACA. Is that fair to say?

5 A It really depends on what you mean by vocal,
6 but I certainly have expressed my views.

7 Q For example, you have testified in Congress
8 about those two areas, have you not?

9 A I have, yes.

10 Q And you have also given interviews to
11 various media outlets about your views --

12 MS. PERALES: Oh, give us that one.

13 Q (By Mr. Dishier) -- on the legality of DAPA
14 and DACA. Is that fair to say?

15 A Yes.

16 Q All right. I'm going to show you Exhibit 1.

17 (Exhibit 1, Houston Chronicle Article,
18 was marked for identification.)

19 Q (By Mr. Dishier) This is one of the articles
20 that quotes you, and if you would turn to -- or first
21 let me just establish, this is from the Houston
22 Chronicle, an article on April 16, 2016. Is that what
23 it looks like to you?

24 A Yes.

25 Q And then if you turn to page 4, please,

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1 starting with the fourth paragraph, the reporter is
2 summarizing some of the statements that you said to
3 her. Do you see that?

4 A Yes.

5 Q Okay. And you said that the, quote, "The
6 legal arguments for both DACA and its 2014 spin-off
7 for parents, DAPA, are basically identical." You said
8 that; right?

9 A Yes.

10 Q And you still agree with that today?

11 A Yes. Provided the word "basically" is
12 understood not to mean exactly the same.

13 Q Sure. And then later, there's a direct
14 quote from you in which you say, quote, "It's hard for
15 me to think of any ground striking DAPA that wouldn't
16 apply to DACA." Did I read that right?

17 A Yes.

18 Q And you still agree with that today; right?

19 A Not entirely actually. I might have spoken
20 too quickly in that brief conversation with the
21 reporter because I do think there are some ways in
22 which DACA could be distinguished from DAPA.

23 Q Okay. And what are those ways?

24 A For one thing, one thing that concerns the
25 court in the DAPA litigation was the sheer size of the

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1 potential affected population. The DACA population is
2 also significant, but much, much smaller than the
3 opposed population for DAPA.

4 Secondly, in the case of DACA, we are
5 talking about an ongoing program in which many people
6 have placed reasonable reliance. That is not quite
7 the same case as with DAPA where the program never did
8 take effect.

9 Q Okay. Anything else?

10 A That's all I can think of at the moment.

11 Q Okay. And so just to summarize, the
12 differences between DAPA and DACA, in your mind, are
13 the sheer size of the population that's potentially
14 eligible and the current ongoing nature of DACA?

15 A Those are the two distinctions that come to
16 mind off the top of my head, but I wouldn't want to
17 represent that there aren't any other differences.

18 Q Okay.

19 (Exhibit 2, The Source Article, was
20 marked for identification.)

21 Q (By Mr. Dishier) Here is another article
22 that's quoting you from September 5, 2017, in a
23 publication called The Source. Do you see that?

24 A Yes.

25 Q Okay. And you are quoted at length, but I

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1 want to talk about the fourth paragraph. You said in
2 the article, quote, "And as I have shown in recent
3 congressional testimony, both DAPA (Deferred Action
4 for Parents of Americans) and DACA are well within the
5 president's legal authority." Did I read that right?

6 A Yes.

7 Q And you still agree with that today?

8 A Yes.

9 Q Okay. And then you say, "Notwithstanding
10 Judge (Andrew S.) Hanen's badly flawed legal reasoning
11 to the contrary." Did I read that right?

12 A Yes.

13 Q And you said that; right?

14 A Yes.

15 Q Okay. And you do still agree today that
16 Judge Hanen's reasoning to the contrary was badly
17 flawed?

18 A Yes.

19 Q Okay. Now, that's not the first time that
20 you have criticized a ruling by Judge Hanen. Is that
21 fair to say?

22 A It's not the only time. I don't recall the
23 exact chronology.

24 Q Okay. Let's look at an article that you
25 have, in fact, written. I'm going to mark it as

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1 Exhibit 3.

2 (Exhibit 3, Article, was marked for
3 identification.)

4 Q (By Mr. Disher) Exhibit 3 is an article
5 titled "When a Judge is Out of Control"; right?

6 A Yes.

7 Q And you wrote this article; right?

8 A Yes.

9 Q You wrote this article in June 3rd -- on
10 June 3rd of 2016?

11 A Correct.

12 Q The judge you're referring to when you say
13 "a judge is out of control" is Judge Hanen; right?

14 A Correct.

15 Q Okay. So let's talk about this article a
16 little bit. The focus of this article was mainly the
17 sanction order that Judge Hanen entered against the
18 Department of Justice in the DAPA litigation; right?

19 A Correct.

20 Q Okay. The end of the first paragraph says,
21 "The Justice Department in fact has done nothing
22 wrong." Did I read that right?

23 A Yes.

24 Q And that was your view when you wrote this
25 article?

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1 A Yes.

2 Q And that's still your view today?

3 A I'm not aware of any facts that have changed
4 it, but yes.

5 Q Okay. And then you say, "Judge Hanen has"?

6 A Yes.

7 Q You said that?

8 A Yes.

9 Q And that was your view then?

10 A Yes.

11 Q And that was still your view today?

12 A Correct.

13 Q And when you say "Judge Hanen has," that's
14 referring to Judge Hanen's sanctioning of the
15 Department of Justice in the DAPA extended DACA case;
16 correct?

17 A That's correct.

18 Q Okay. So what you're meaning to say is that
19 Judge Hanen was wrong to sanction the Department of
20 Justice in the predecessor case; right?

21 A In my opinion, yes.

22 Q And that's still your opinion today?

23 A Yes.

24 Q Okay. So let's turn the page. Now, that is
25 not the only opinion from Judge Hanen that you

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1 criticize in this article. Is that fair to say?

2 A Yes.

3 Q For example, in the second paragraph on the
4 second page, you talk about a bizarre and venomous
5 attack on President Obama's enforcement -- immigration
6 enforcement strategies; right?

7 A Yes.

8 Q And do you remember which ruling you were
9 referring to when you referred to it as a bizarre and
10 venomous attack?

11 MS. PERALES: Excuse me, Todd. Are you
12 pointing to something in particular?

13 MR. DISHER: Yes.

14 MS. PERALES: I'm sorry. I'm having a hard
15 time following along.

16 MR. DISHER: It's in the second paragraph of
17 the second page.

18 MS. PERALES: Thank you.

19 A I'm sorry. Could you repeat the question,
20 please.

21 Q (By Mr. Dishier) Of course. Do you remember
22 which opinion you were referring to that you labeled a
23 bizarre and venomous attack?

24 A Yes. I'm not one hundred percent sure that
25 I recall the name correctly, but I believe it was the

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1 Martinez-Nava case.

2 Q Okay. And that was an opinion issued by
3 Judge Hanen?

4 A Yes.

5 Q Okay. And it's still your opinion today
6 that that opinion was a bizarre and venomous attack on
7 President Obama's immigration enforcement strategies?

8 A Yes.

9 Q Okay. Now, in the next paragraph on page 2,
10 you talk about a rambling, vitriolic 123-page opinion.
11 The opinion you're referring to there was Judge
12 Hanen's opinion in the DAPA expanded DACA case; is
13 that right?

14 A Correct.

15 Q And it's still your opinion today that that
16 decision was rambling and vitriolic?

17 A Yes.

18 Q Okay. Then the next paragraph, you're still
19 talking about that same opinion from Judge Hanen and
20 you say, "Judge Hanen's opinion was rife with factual
21 errors, selective use of the evidence, and legal
22 distortion." Did I read that right?

23 A Yes.

24 Q And that's still your opinion today?

25 A Yes, it is.

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1 Q Okay. Those flaws also existed in your
2 opinion in the Fifth Circuit's decision to affirm the
3 injunction against DAPA and expanded DACA. Is that
4 fair to say?

5 A I'm sorry. Can you point me to the
6 paragraph you're referring to now?

7 Q The same paragraph. And I'm not referring
8 to something you specifically say here, but I'm rather
9 asking you a question. Does the Fifth Circuit opinion
10 affirming Judge Hanen's injunction on DAPA and
11 expanded DACA contain factual errors, selective use of
12 the evidence, and legal distortion?

13 A I think to some extent, but I have to say
14 that it's been a couple of years now since I've read
15 the opinion; so it would be hard for me to identify
16 specifics off the top of my head.

17 Q Okay. But to some extent it does?

18 A To some extent, yes.

19 Q In your opinion?

20 A Yes.

21 Q Okay. Now you say -- the next sentence
22 says, "Many legal scholars have already exposed its
23 multiple flaws." When you say "its multiple flaws,"
24 you're referring to Judge Hanen's opinion on DAPA and
25 expanded DACA; correct?

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1 A Correct.

2 Q And then the source you cite to is your own
3 testimony to Congress; right?

4 A That's right. In my testimony, I cited
5 other scholars.

6 Q Okay. But, again, the thrust of this
7 article is not Judge Hanen's opinion on DACA and
8 expanded DACA, it's about Judge Hanen's opinion
9 sanctioning DOJ in that case?

10 A Correct.

11 Q Okay. So if you look at the bottom of page
12 2, your first criticism of his sanction is the, quote,
13 "Wide sweep of that remedy." Do you see that?

14 A Yes.

15 Q Okay. And today, you still are of the
16 opinion that his sanction order, the remedy was too
17 broad?

18 A I felt that it was too broad at the time it
19 was first announced. I understand, based on
20 information that I received recently, that the order
21 has since changed and that Judge Hanen, in particular,
22 decided not to require the government to release the
23 names of the DACA recipients.

24 Q Do you know how Judge Hanen's order has
25 changed specifically?

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1 A I don't know the specifics, no.

2 Q Okay. So then if you turn to the next page,
3 you say, "The problems with Judge Hanen's sanction
4 order ran deeper than just the remedy"; right?

5 A Correct.

6 Q You say, quote, "The government simply did
7 nothing wrong to begin with." And that's still your
8 opinion today?

9 A It is, yes.

10 Q And then you say, quote, "And that is what
11 makes Judge Hanen's blistering attack on the Justice
12 Department attorneys' ethics and the consequent public
13 defamation of their character all the more shameful."
14 You said that; right?

15 A Yes.

16 Q And that's still your opinion today?

17 A Yes.

18 Q So you accused Judge Hanen of defaming the
19 Department of Justice?

20 A This was not meant as a personal attack on
21 Judge Hanen. It was meant to express my strong
22 disagreement with his analysis and his outcome and the
23 consequence of accusing Justice Department attorneys
24 of unethical conduct that I felt they were not guilty
25 of.

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1 Q And the consequence you're referring to
2 there is, in part, the public defamation of their
3 character?

4 A Yes.

5 Q Okay. And then you say that public
6 defamation of their character was, quote, "shameful"?

7 A Yes.

8 Q And that's still your opinion today?

9 A Yes.

10 Q Okay. If you turn to the next page, the
11 first full paragraph on page 4, you say, "Judge
12 Hanen's accusation of deliberate deception is absurd
13 for two reasons." Let's -- before we go any further,
14 you say that Judge Hanen deliberately deceived
15 somebody in his sanction order?

16 A No. I said that what he was accusing the
17 Justice Department attorneys of was deliberate
18 deception.

19 Q Oh, I see. And then -- but you say that
20 that accusation was absurd?

21 A Correct.

22 Q Okay. And that's still your opinion today?

23 A Yes.

24 Q Okay. If you look down to the last
25 paragraph on that page, the second sentence in talks

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1 about people who already qualified under the original
2 DACA criteria, which no one was challenging?

3 A Yes.

4 Q Okay. Is it your opinion that nobody was
5 challenging the three-year extended DACA term in that
6 first litigation?

7 A No. I refer there to the original DACA
8 criteria. The keyword is criteria, not the duration
9 of deferred absence for those people who meet those
10 criteria.

11 Q I see. So do you know, whether in that
12 case, the coalition of plaintiff states was, in fact,
13 challenging the three-year extended term created by
14 the 2014 memo?

15 A My understanding is that they were
16 challenging that, yes.

17 Q Okay. So then if you go to the next page,
18 page 5, about middle way down the first paragraph, you
19 say, "To claim surprise assumes he not only didn't
20 read the very document he was enjoining, but also
21 didn't read his own opinion." Do you see that?

22 A Yes.

23 Q And you said that then; right?

24 A Yes.

25 Q Is that still your opinion today?

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1 A Yes.

2 Q Okay. So you're accusing Judge Hanen of not
3 reading the very document he was enjoining, which was
4 the 2014 DAPA extended DACA memo?

5 A My point is that he could not have read his
6 own opinion and still reached the conclusion that the
7 issuance of three-year deferred action grants to those
8 people who qualified under the original DACA criteria,
9 he could not have reached the conclusion that -- that
10 they had not yet begun to issue three-year grant under
11 that program because they had announced as early as
12 November 20, 2014, that four days hence, on
13 November 24th, they would begin issuing three-year
14 grants to people who qualify under the original DACA
15 criteria. Judge Hanen quoted that portion of the memo
16 in his own opinion. So it seems to me that he could
17 not have read that part of his own opinion and still
18 reached the conclusion he did.

19 Q So you're saying that he could not have read
20 his own opinion and still reached that conclusion that
21 he did?

22 A And not correctly reached the conclusion he
23 did.

24 Q But you don't really think that he didn't
25 read his own opinion, do you?

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1 A There's no way for me to know that, though.

2 Q You think it's possible that he didn't read
3 his own opinion?

4 A You're asking me to speculate about
5 something I have no knowledge of.

6 Q So you're not going to -- you can't say one
7 way or the other whether you think that Judge Hanen
8 read his own opinion sanctioning the Department of
9 Justice in the DAPA extended DACA case?

10 A I have no basis for knowing the answer to
11 that.

12 Q Okay. So then let's look at the last
13 paragraph of the article. You say, quote, "Judges,
14 above all else, are to be impartial. That doesn't
15 mean they cannot have preexisting policy preferences.
16 It does mean they cannot let their political biases
17 and their emotions overcome their fair appraisals of
18 the evidence and their fair interpretations of the
19 law. Judge Hanen has crossed that line again." Did I
20 read that right?

21 A Yes.

22 Q Okay. So when you say "again," first you're
23 talking about the order sanctioning the Department of
24 Justice; right?

25 A Correct.

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1 Q But the "again" also is referring to the
2 injunction enjoining DAPA and expanded DACA?

3 A Correct.

4 Q Are you also referring to the bizarre and
5 venomous attack that we talked about earlier?

6 A That was not the episode I was referring to
7 in that sentence.

8 Q Okay. So that sentence is simply referring
9 to the sanction order against the Department of
10 Justice and the injunction blocking DAPA and expanded
11 DACA?

12 A Correct.

13 Q Okay. Now, you understand that when Judge
14 Hanen's injunction went to the Fifth Circuit, Judge
15 Smith and Judge Elrod affirmed his injunction; right?

16 A Yes.

17 Q Okay. Did, in your opinion, Judge Smith and
18 Judge Elrod let their political biases and emotions
19 overcome their fair appraisal of the evidence and fair
20 interpretation of the law?

21 A I would have no basis for saying that.

22 Q Why not?

23 A Because I don't know who Judge Smith or
24 Judge Elrod are or anything else they've said that
25 would give an indication of what their biases are.

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1 Q But you've read their order or their opinion
2 affirming the injunction?

3 A Yes.

4 Q And based on reading that opinion, do you
5 think that they made a fair appraisal of the evidence
6 and a fair interpretation of the law?

7 A I do not think the appraisal of the evidence
8 was consistent with the evidence actually offered, in
9 particular, on the subject of whether true discretion
10 was being exercised. And as to the interpretation of
11 the law, I did not agree with them. But I would not
12 go so far as to say that either of those judges was
13 inclined to be unfair.

14 Q Okay. Do you think that their opinion
15 affirming the injunction was fair?

16 A It really depends on what you mean by fair.
17 I personally think it was incorrect. And I think that
18 much of the analysis was flawed, in my humble opinion.
19 But I have no reason to question their sincerity in
20 issuing a decision that they felt was fair.

21 Q Okay. So since you have no reason to
22 question Judge Smith and Judge Elrod's ability to be
23 fair, why do you have a basis to question Judge
24 Hanen's ability to be fair?

25 A Well, Judge Hanen in the Martinez-Nava case,

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1 if I have the name of that case correct, in my
2 opinion, revealed a very strong bias against President
3 Obama's immigration enforcement policies generally.
4 There's no comparable history that I'm aware of with
5 either Judge Smith or Judge Elrod.

6 Secondly, I felt that the comments that
7 Judge Hanen made on the issue of sanctions were very
8 unfair toward the Justice Department attorneys.

9 Q Okay. Anything else?

10 A That's all I can think of at the moment.

11 Q All right.

12 (Exhibit 4, Law Review Article, was
13 marked for identification.)

14 Q (By Mr. Disher) Actually, before -- one last
15 question on Exhibit 3. Today -- as we sit here today,
16 do you still think that Judge Hanen's injunction
17 against DAPA and expanded DACA shows that his
18 political bias and emotions overcame his fair
19 appraisal of the evidence and fair interpretation of
20 the law?

21 A I would say that the opinion, combined with
22 the prior history, still leads me to that conclusion.

23 Q Okay.

24 A Thank you.

25 Q I've handed you Exhibit 4. This is a law

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1 review article that you wrote; right?

2 A Yes.

3 Q And it was published in the spring of 2018?

4 A Correct.

5 Q All right. I just want to walk through this
6 a little bit and ask you a few questions about it.

7 Okay. So first, if we turn to -- I'll use
8 the pagination as it exists on the law review article.

9 So if we turn to page 331 --

10 A Okay.

11 Q -- I just want to ask you, you say in the
12 second paragraph, there's a sentence that begins, "In
13 each of these contexts, the critics." Do you see
14 that?

15 A Yes.

16 Q Okay. So then you say, "We liberals are now
17 hoisted by our own petards." Do you see that part?

18 A Yes.

19 Q And when you say "we liberals," I mean, you
20 consider yourself a liberal?

21 A It depends on the issue, of course. But on
22 the particular issues discussed in this paper, I would
23 describe my views as being on the liberal side.

24 Q Okay. So let's go to page 334, please. The
25 last paragraph on the page, there's a sentence that

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1 begins, "No DACA supporter." Do you see that?

2 A Oh, yes. I see it now.

3 Q Okay. So the sentence says as you wrote it,
4 "No DACA supporter of whom I am aware has ever
5 disputed that deferred action gives rise to lawful
6 presence." Did I read that right?

7 A Yes.

8 Q Okay. And that's still your opinion today?

9 A Yes.

10 Q Okay. Do you know when DACA was announced,
11 or rather -- when -- when the 2012 DACA memo was
12 issued, did that memo include the phrase "lawful
13 presence"?

14 A I'm going by memory, but I believe it did
15 not.

16 Q Okay. What about the 2014 DAPA extended
17 DACA memo, do you know if it did?

18 A I'm pretty sure that it did, yes.

19 Q Okay. Okay. If you turn the page, please,
20 there's a sentence in the middle of the first
21 paragraph that begins, "As I have argued."

22 A Yes.

23 Q Okay. So it reads, "As I have argued
24 elsewhere, DACA and DAPA are well within the legal
25 authority of the executive branch, the Fifth Circuit's

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1 poorly-reasoned 2-1 panel decision notwithstanding."

2 Did I read that right?

3 A Yes.

4 Q And that's still your opinion today?

5 A Yes.

6 Q Including the fact that the 2-1 panel
7 decision from the Fifth Circuit was poorly-reasoned?

8 A Yes.

9 Q Okay. Okay. Then starting with the next
10 paragraph, you contrast DACA and DAPA to some other
11 executive actions. Do you see that?

12 A Yes.

13 Q Okay. And those other executive actions
14 that you contrast DACA and DAPA to are the travel ban
15 and the DACA rescission; correct?

16 A Correct.

17 Q Okay. And you say at the beginning of that
18 paragraph, "Let us be clear about one fundamental
19 fact: The specific legal issues in litigation
20 challenging DACA and DAPA have almost nothing relevant
21 in common with the legal issues in either the travel
22 ban litigation or the DACA rescission litigation."

23 Did I read that right?

24 A Yes.

25 Q Is that still your opinion today?

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1 Q And one argument that certain people have
2 put forth is that DAPA and DACA, and correct me if I'm
3 wrong, but that DAPA and DACA have some parallel to
4 the Family Fairness programs; is that right?

5 A It depends on what you mean by parallel.
6 They do have some commonalities with that program.

7 Q Okay. But then you say in -- starting in
8 the middle of this paragraph, quote, "As a member of
9 the Obama Administration integrally involved in the
10 rollout and implementation of DACA, I can attest
11 firsthand that this point was not a sine qua non for
12 the President's decision." Did I read that right?

13 A Yes.

14 Q And that's still your opinion today?

15 A Yes.

16 Q And then you say, "Immigrant advocacy
17 organizations can claim the lion's share of credit for
18 that."

19 A Yes.

20 Q Still your opinion today?

21 A Yes.

22 Q And then you say, "The reference to the
23 Reagan/Bush policy was merely a makeweight; there is
24 no doubt that the policy would have been issued even
25 without analogous programs in the 1980s."

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1 A Yes.

2 Q And that's still your opinion today?

3 A Yes.

4 Q Okay. What does makeweight mean?

5 A Makeweight is an argument that bolsters
6 one's argument, but is not essential to it.

7 Q Got it.

8 (Exhibit 5, Declaration, was marked for
9 identification.)

10 Q (By Mr. Disher) Okay. Now let's turn to the
11 declaration that you provided in this case. I'm going
12 to mark that as Exhibit 5.

13 MS. PERALES: I'm just going to -- while
14 you're doing your housekeeping there, I just want to
15 point out to the witness that if a document has a
16 yellow sticker on it, you have to give it back to the
17 court reporter at the end of the deposition.

18 THE WITNESS: Okay.

19 MS. PERALES: Don't take it away.

20 THE WITNESS: And don't write on it.

21 MS. PERALES: Unless counsel asks you to
22 write on it. But most important is not to leave with
23 it because the court reporter needs those yellow
24 stickers.

25 THE WITNESS: Okay. Thank you.

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1 Q (By Mr. Disher) And you know what? Before
2 we get to Exhibit 5, I had skipped a portion that I
3 was intending to ask you about. And that was I want
4 to get a little bit of background about your
5 employment by the Federal Government. When -- what
6 years were you employed by any portion of the Federal
7 Government?

8 A From 1979 to 1981, I served as a staff
9 attorney at the U.S. Court of Appeals for the Ninth
10 Circuit. For a very brief period of time, and I can't
11 recall how many months, I was a paid employee of
12 the -- as a part-time consultant by the Immigration
13 and Naturalization Service at the beginning of the
14 administration of President George H.W. Bush. And I
15 continued in that capacity, but on an unpaid basis for
16 most of the remainder of the president's term.

17 Then from October of 2011 to October of
18 2013, I served as the Chief Counsel of USCIS in the
19 Department of Homeland Security.

20 Q Let me pause you right there. So from 2011
21 to 2013, you served as the Chief Counsel for USCIS?

22 A Correct.

23 Q And that was during the time in which DACA
24 was announced?

25 A That's right.

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1 Q Have -- no, that is correct, you have not
2 observed -- Let me ask -- let me ask the question
3 again.

4 Since 2013, you have not observed any DACA
5 adjudications; correct?

6 A Correct.

7 Q Okay. How many DACA applications have you
8 personally adjudicated?

9 A None.

10 Q Okay. How many DAPA applications have
11 people who report directly to you adjudicated?

12 A None. The only people who reported to me
13 were other attorneys, not adjudicators.

14 Q All right. Keep going.

15 A Paragraph 39 comments on the -- interprets
16 and comments on the approval of denial -- wait,
17 approval/denial rates for DACA and what that approval
18 rate was. That's extremely important information for
19 the issue of whether case-by-case adjudication is
20 truly taking place.

21 Q And that paragraph is based on data released
22 by USCIS?

23 A In part. That -- those data require some
24 interpretation. For example, the figures for denials
25 are accompanied by a footnote that also -- that says

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1 that if there were any indication of that happening, I
2 would absolutely have been aware of it.

3 Q During the two years that you were at USCIS?

4 A Correct.

5 Q Have you reviewed any of the production from
6 the federal defendants in this case?

7 A No, I have not.

8 Q Okay.

9 A In the case of paragraph 49, some of the
10 statements, or at least one of the statements, that
11 the adjudicator has to struggle with determining how
12 probable and how severe a danger has to be in order
13 for a denial to be warranted, is based on my
14 experience at USCIS and knowing how often that subject
15 can come up. But I don't think I can comment on the
16 specifics of those discussions without breaching
17 privilege.

18 Q Understood.

19 A Okay.

20 Q But, again, those discussions would have
21 only occurred during the two years that you were at
22 USCIS?

23 A For those discussions, yes.

24 Q Ending in 2013?

25 A Yes.

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1 Okay. Going back to your declaration,
2 Exhibit No. 5, if somebody wanted to repeat your
3 methodology to test your opinions, how would that
4 person do that?

5 A I guess it would depend on the particular
6 statement that they're challenging, whether it's a
7 factual statement or a legal statement, and in either
8 case, what -- what the basis for that statement was.

9 Q Okay.

10 A I don't know that I could generalize it.

11 Q So if somebody was going to test your legal
12 opinions, how would they do that?

13 A It would depend on what the opinion is. For
14 example, if it were an interpretation of a case, they
15 would read that case and perhaps read other cases that
16 have followed that case or any other legal authority
17 that might shed light on what that case means.

18 Q Okay.

19 A Same if it were a statute or if it were a
20 regulation.

21 Q All right. And in terms of the factual
22 opinions in your declaration, the sources that I heard
23 you mention were your time at USCIS from 2011 to 2013?

24 A Mm-hmm.

25 Q That's one source; right?

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1 A Correct.

2 Q Your other source was conversations that you
3 may have had with other immigration scholars?

4 A Correct.

5 Q And there was a third -- oh, and publicly
6 available documents?

7 A Yes. And conversations with immigration
8 practitioners.

9 Q Okay. Any other sources?

10 A I can't think of any off the top of my head,
11 but perhaps there are others. I would need to answer
12 that question in the context of specific factual
13 assertions.

14 Q Okay. When an immigration service officer
15 is looking at an application to determine whether the
16 stated criteria have been met, do you know what
17 standard of proof that immigration service officer is
18 to use in evaluating the application?

19 A I believe it is a preponderance of the
20 evidence, which means more likely than not.

21 Q Okay. If a person is currently in a removal
22 proceeding and then applies for DACA, and gets DACA,
23 what happens to the removal proceeding?

24 A I'm not one hundred percent sure, but during
25 the time that I was there, a removal proceeding would

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1 Q And because they got work authorization, the
2 regulations applying to protect those with work
3 authorization applied to these individuals and their
4 DACA status?

5 A That's right. The practical effect of
6 revoking DACA was that the work permit that depended
7 on it was no longer in force.

8 Q And because of the protections of work
9 authorization, the court in this case ruled that the
10 Department of Homeland Security could not revoke these
11 individuals' DACA status?

12 A That's right. They have to follow their own
13 regulations.

14 Q Okay. I forgot to ask you one additional
15 question. So earlier we had talked about the
16 differences between DACA and DAPA; right? And you can
17 think of two right now. One is the size of the
18 population, which you said doesn't affect the merits
19 of whether DACA and DAPA are legally the same thing;
20 correct?

21 A In my opinion, it should not have that
22 effect.

23 Q Okay. And then the second thing you
24 mentioned was the ongoing nature of the DACA program
25 as opposed to the soon-to-be implemented nature of the

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1 DAPA program; correct?

2 A Correct.

3 Q But, again, in your opinion, going to the
4 underlying merits of whether these two programs are
5 legal, that shouldn't make a difference; correct?

6 A Correct.

7 MR. DISHER: Okay. I have nothing further.

8 I'll pass the witness.

9 MS. PERALES: Can we take a break before
10 Jeffrey gets his chance to ask questions?

11 MR. ROBINS: Sure.

12 (Whereupon, a brief break was taken.)

13 EXAMINATION

14 QUESTIONS BY MR. ROBINS:

15 Q So thank you, Mr. Legomsky. Again, my name
16 is Jeff Robins. I'm the attorney representing the
17 federal defendants from the Department of Justice and
18 I probably only have three or four questions, give or
19 take some follow-up.

20 As we wound up Mr. Fisher's questions, you
21 were indicating your understanding of what happened in
22 the Inland Empire matter based on Exhibit 11. Do you
23 recall that?

24 A Yes.

25 Q And you stated that the court's ruling in

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1 EXAMINATION

2 QUESTIONS BY MR. DISHER:

3 Q Mr. Legomsky, a few follow-up questions.

4 First, you mentioned piecing it all
5 together; right?

6 A Yeah.

7 Q You don't dispute that Judge Hanen himself
8 can piece it all together without your help, do you?

9 A I think that to reach a reliable decision,
10 anyone who is not an immigration specialist would need
11 the guidance of someone who understands the intricate
12 network of statutory and regulatory provisions and
13 case law that these decisions require. I spend an
14 entire semester emersed in teaching the students the
15 complexities of immigration law. And I would be very
16 wary of anyone who is not a specialist making these
17 decisions without input from a specialist.

18 Q That specialist could be a lawyer for one of
19 the parties in the case?

20 A It could be if the lawyers are specialists
21 in immigration law.

22 Q Okay.

23 A Otherwise, I think it would be unreliable.

24 Q Going back to the idea of the outer limit of
25 the executive's ability to grant work authorization,

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REPORTER CERTIFICATE

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I, REBECCA L. TUGGLE, a Registered Professional Reporter, Certified Court Reporter, and Certified Shorthand Reporter within and for the State of Missouri, do hereby certify that there came before me on August 1, 2018, at Alaris Litigation Services, 711 N. 11th Street, St. Louis, Missouri 63101

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STEPHEN LEGOMSKY

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who was by me first duly sworn; that the witness was carefully examined; that said examination was reported by myself, translated and proofread using computer-aided transcription; and the above transcript of proceedings is a true and accurate transcript of my notes as taken at the time of the examination of this witness.

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I further certify that I am neither attorney nor counsel for nor related nor employed by any of the parties to the action in which this examination is taken; further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in this action.

Dated this 2nd day of August, 2018.

Becca Tuggle

Rebecca L. Tuggle, RPR, CCR, CSR